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HEMRAJ & CO SDN BHD v. TENAGA NASIONAL BHD

FEDERAL COURT, PUTRAJAYA
ABDUL RAHMAN SEBLI FCJ
ZABARIAH MOHD YUSOF FCJ
HASNAH MOHAMMED HASHIM FCJ
B [CIVIL APPEAL NO: 02(f)-65-11-2021(W)]
13 DECEMBER 2022

Abstract – *A non-delegable duty of care, a no fault strict liability tort, must be imposed only in the most exceptional circumstances. Routine excavation works carried out by homeowners through independent contractors could not be described as an extraordinarily hazardous activity, thereby, the homeowner could not be held to owe a non-delegable duty of care to a public utilities company for the negligence of the independent contractors. As a matter of policy, to hold that routine residential construction works are subject to non-delegable duty would expose homeowners to an indeterminate liability for the tortious acts of their independent contractors, whose manner of work are beyond their control.*

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TORT: *Negligence – Liability – Non-delegable duty of care – Claim by public utility company for damage caused by third-party contractors hired by homeowners – Whether works carried out extraordinarily hazardous activity – Whether routine residential construction works – Whether homeowner liable for negligence of third-party contractors – Whether non-delegable duty applied only in limited and exceptional circumstances – Whether risk of damage could be avoided if precautionary measures taken*

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TORT: *Damages – Liability – Negligence – Non-delegable duty of care – Claim by public utility company ('TNB') for damage caused by third-party contractors hired by homeowners – Whether homeowner liable for negligence of third-party contractors – Whether licenses issued to consultants and contractors – Whether duty of homeowners to obtain approval from TNB – Whether s. 37(12)(a) of Electricity Supply Act 1990 prohibits persons who carry out works in vicinity of electrical installations without TNB's authority – Whether failure to obtain approval attracts penalty under s. 37(12)(b)*

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The plaintiff, Tenaga Nasional Berhad ('TNB'), claimed for costs and expenses incurred for emergency repairs and replacement of its underground cable, which was damaged due to excavation works carried out by third-party contractors, hired by the first defendant ('appellant') and second defendant, in front of a house belonging to the defendants. The excavation works was to connect the septic tank of the house to the main public sewerage system. TNB claimed that since the defendants appointed the third parties as

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consultants and contractors for the excavation, the defendants owed TNB a non-delegable duty of care. Consequently, TNB claimed that the defendants were liable for the negligence of their appointed consultants/contractors. The defendants took third party proceedings for indemnity against the consultants and contractors which were hired by them. The High Court found that the appellant owed a non-delegable duty of care to TNB and therefore liable for the loss and expense incurred by TNB, despite making a finding that the first third party was the immediate tortfeasor and was blatantly negligent. The claim against the second defendant was dismissed with costs. The Court of Appeal affirmed the findings of the High Court in that the duty imposed on the appellant was a positive duty to protect TNB underground cables and subsequently to the public, who are users of electricity distributed/transmitted *via* the underground cable. As such, the Court of Appeal held that the case fell within category 1 of the doctrine of non-delegable duty of care, in relation to highway and hazard cases. Leave to appeal was granted by this court to the appellant upon the following questions of law: (i) whether as a matter of policy, routine residential construction work carried out by a homeowner through its independent contractors is so extraordinarily hazardous as to impose a non-delegable duty of care on the homeowner to a public utility company, namely TNB, for the negligence of those independent contractors; (ii) if the answer to the first question was in the negative, whether there is a special relationship between the homeowner and TNB which satisfies the criteria of the 'second category' described in *Woodland v. Essex County Council* ('*Woodland*') such as to impose a non-delegable duty of care on the homeowner in respect of the negligence of its independent contractors; and (iii) whether non-delegable duty of care is a cause of action that must be expressly pleaded particularising the basis on which the duty is said to arise or whether it is a matter of law which may be raised during submissions. Hence, the main thrust of the appeal was whether the appellant owed a non-delegable duty of care to TNB – a personal duty to ensure that reasonable care was taken by the third-party contractors in doing the said excavation works. TNB's stand was, *inter alia*, that once the court established that the activity was carried out on a public road or highway, that would attract the non-delegable duty of care.

Held (allowing appeal with costs)
Per Zabariah Mohd Yusof FCJ delivering the judgment of the court:

(1) Liability in the tort of negligence is contingent on personal fault and a defendant would generally not be personally liable for the act of another. Non-delegable duty of care is a derogation from this fault-based principle. Non-delegable duty of care is a common law tort, the principle of which, a defendant who delegates the performance of its integral duty to an independent contractor, will invariably be held liable for the negligence of the independent contractor. It imposes a personal

A duty on the defendant to procure the careful performance of its integral work delegated to others. It is a term used to denote a duty which cannot be discharged by entrusting its performance to an independent contractor. (paras 13 & 14)

(2) Based on the categorisation in *Woodland*, the first category referred to B extraordinarily hazardous activities, regardless of where the activity was carried out. *Woodland* was not creating a new class within the first category, but merely explaining and giving examples of the development of the tort in the earlier cases which concerned the creation of hazards in a public place, which would constitute a public nuisance. The non- C delegable duty should only be applied in limited and exceptional circumstances because the doctrine imposes a stringent duty and that in many instances, it would be unrealistic or almost impossible for the duty bearer to fulfil the duty in question. The present thinking is to do away with the categorisation of what is extraordinarily hazardous, which is D considered as arbitrary categorisation but to make an assessment of the activity and whether there are precautions available to remove or mitigate the hazard. (paras 36-38)

(3) The excavation works undertaken by TNB did not attract the imposition of the non-delegable duty of care. The precautionary measure that ought E to have been taken by the third-party contractors was the utility mapping exercise before doing any excavation as that would indicate the presence of TNB's underground cable. However, no utility mapping exercise was done by the third-party contractors. Had the utility mapping exercise been carried out, the precise location of the TNB's cables would be F known and hence, would have prevented the third party contractors from drilling into and damaging the TNB cables. The risk of damage to the TNB cables could have been avoided. (paras 40-43)

(4) Section 37(12)(a) of the Electricity Supply Act 1990 cannot be construed to impose a non-delegable duty of care on the part of the homeowner. G Neither does it state that it was the duty of homeowners to obtain approval from TNB. All licenses were either issued or were required to be issued to the consultants and contractors (third parties). They were not required to be issued to the defendants, as homeowners. The provision prohibits persons who carry out works in the vicinity of H electrical installations without TNB's authority. Failure to obtain such approval attracts a penalty as provided in s. 37(12)(b) of the same. (paras 52 & 52)

(5) The activity of excavation works in this case could not reasonably be said to be extraordinarily hazardous. There was no evidence that there I was a particular risk from the renovation works that remained substantial even if the renovation works were done properly.

Excavation works carried out by the independent contractors were routine residential construction works carried out by a homeowner through its independent contractors and could not be described as extraordinarily hazardous activity, whereby the homeowner owes a non-delegable duty of care to a public utility company, namely TNB, for the negligence of those independent contractors. (paras 57 & 58)

(6) After fulfilling the threshold requirements, *ie*, the *Woodland* categories and the five defining features of the special relationships under the second category, the court has to further consider whether it is fair and reasonable to impose a non-delegable duty of care in the particular circumstances, having regard to policy considerations. As a matter of policy, from a risk allocation point of view, it would not be fair, just and reasonable to hold that routine residential construction works are subject to non-delegable duty as this would expose homeowners to an indeterminate liability for the tortious acts of their independent contractors, whose manner of work are beyond their control. Question (i) was thus answered in the negative (paras 59-61)

(7) Essentially, the principle of non-delegable duty of care is the imposition of a positive duty to protect one from harm, which is the fundamental jurisprudence of the law of negligence. The phrase 'the positive duty to protect another from harm' is not to be confused with the defining features of the special relationship which exists in establishing the second category of cases which states 'The defendant delegated to a third party a function which is an integral part of the positive duty …'. The point or issue under the second category in this respect is not about 'positive duty' *per se*, but the 'defendant delegating to a third party a function which is an integral part of the positive duty of the defendant's.' Hence, there was no issue of the Court of Appeal conflating the first and the second categories. Therefore, the court declined to answer question (ii). (paras 63-67)

(8) The essence of a non-delegable duty is a duty to ensure that care is taken. TNB had sufficiently pleaded the essence of a non-delegable duty of care. Hence, the court declined to answer question (iii). (paras 68-70)

Bahasa Melayu *Headnotes*

Plaintif, Tenaga Nasional Berhad ('TNB'), menuntut kos dan perbelanjaan yang ditanggung untuk pembaikan dan penggantian kecemasan kabel-kabel bawah tanahnya, yang rosak akibat kerja-kerja penggalian yang dilakukan oleh kontraktor pihak ketiga, diupah oleh defendan pertama ('perayu') dan defendan kedua, di hadapan rumah milik defendan-defendan. Kerja-kerja penggalian itu adalah untuk menyambung tangki najis rumah itu dengan sistem pembetungan awam utama. TNB menyatakan bahawa semenjak defendan-defendan melantik pihak-pihak ketiga sebagai perunding-perunding dan kontraktor-kontraktor untuk penggalian tersebut, defendan-defendan

A mempunyai kewajipan berjaga-jaga tidak boleh diwakilkan terhadap TNB. Berikutan itu, TNB menyatakan bahawa defendan-defendan bertanggungan terhadap kecuaian perunding-perunding/kontraktor-kontraktor lantikan mereka. Defendan-defendan memulakan prosiding pihak ketiga untuk indemniti terhadap perunding-perunding dan kontraktor-kontraktor yang
B dilantik oleh mereka. Mahkamah Tinggi mendapati perayu mempunyai kewajipan berjaga-jaga tidak boleh diwakilkan terhadap TNB dan oleh itu bertanggungan untuk kerugian dan perbelanjaan yang ditanggung TNB, walaupun membuat dapatan bahawa pihak ketiga pertama adalah pelaku salah utama dan jelas cuai. Tuntutan terhadap defendan kedua ditolak dengan
C kos. Mahkamah Rayuan mengesahkan dapatan-dapatan Mahkamah Tinggi bahawa kewajipan yang dikenakan ke atas perayu adalah kewajipan positif untuk melindungi kabel-kabel bawah tanah TNB dan selanjutnya terhadap pihak awam, yang adalah pengguna-pengguna elektrik yang disalurkan/ dialirkan melalui kabel bawah tanah tersebut. Oleh itu, Mahkamah Rayuan memutuskan bahawa kes tersebut terangkum bawah kategori 1 doktrin
D kewajipan berjaga-jaga tidak boleh diwakilkan, berkaitan kes-kes lebuh raya dan membahayakan. Kebenaran merayu diberikan oleh mahkamah ini kepada perayu atas soalan-soalan undang-undang berikut: (i) sama ada sebagai perkara polisi, kerja binaan rutin kawasan perumahan yang dibuat oleh pemilik rumah melalui kontraktor-kontraktor bebas membahayakan
E secara luar biasa sehingga mengenakan kewajipan berjaga-jaga tidak boleh diwakilkan pada pemilik rumah terhadap syarikat utiliti awam, iaitu TNB, untuk kecuaian kontraktor-kontraktor bebas itu; (ii) jika jawapan untuk soalan pertama adalah secara negatif, sama ada terdapat hubungan khas antara pemilik rumah dan TNB yang memenuhi kriteria 'kategori kedua'
F dinyatakan dalam *Woodland v. Essex County Council* ('*Woodland*') seperti mengenakan kewajipan berjaga-jaga tidak boleh diwakilkan pada pemilik rumah berkaitan kecuaian kontraktor-kontraktor bebas; and (iii) sama ada kewajipan berjaga-jaga tidak boleh diwakilkan adalah kausa tindakan yang mesti jelas diplidkan dengan membutirkan asas kewajipan itu dikatakan
G berbangkit atau sama ada itu adalah perkara undang-undang yang boleh dibangkitkan semasa penghujahan. Oleh itu, perkara utama rayuan adalah sama ada perayu mempunyai kewajipan berjaga-jaga tidak boleh diwakilkan terhadap TNB – kewajipan peribadi untuk memastikan penjagaan munasabah diambil oleh kontraktor-kontraktor pihak ketiga apabila melakukan kerja-
H kerja penggalian tersebut. Hujahan TNB adalah, antara lain, bahawa sebaik sahaja mahkamah membuktikan aktiviti yang dijalankan adalah atas jalan awam atau lebuh raya, itu menarik kewajipan berjaga-jaga tidak boleh diwakilkan.

Diputuskan (membenarkan rayuan dengan kos)

I **Oleh Zabariah Mohd Yusof HMP menyampaikan penghakiman mahkamah:**

(1) Liabiliti dalam tort kecuaian bergantung pada kesalahan sendiri dan defendan secara amnya tidak bertanggungan secara peribadi untuk

tindakan orang lain. Kewajipan berjaga-jaga tidak boleh diwakilkan adalah penyimpangan daripada prinsip berasaskan kesalahan ini. Kewajipan berjaga-jaga tidak boleh diwakilkan adalah tort dalam common law, iaitu pada prinsipnya, defendan yang mewakilkan pelaksanaan kewajipan asasnya pada kontraktor bebas, akan sentiasa dipertanggungjawabkan atas kecuaian kontraktor bebas. Ini mengenakan kewajipan peribadi atas defendan untuk pelaksanaan secara berhati-hati kerja-kerja integral yang diwakilkan pada orang lain. Itu adalah terma yang digunakan untuk menunjukkan kewajipan yang tidak boleh dilepaskan dengan mengamanahkan pelaksanaannya pada kontraktor bebas.

(2) Berdasarkan pengkategorian dalam kes *Woodland*, kategori pertama merujuk pada aktiviti-aktiviti yang berbahaya secara luar biasa, tanpa mengira di mana aktiviti itu dijalankan. *Woodland* tidak membentuk kelas baharu dalam kategori pertama, tetapi semata-mata menjelaskan dan memberi contoh perkembangan tort dalam kes-kes terdahulu yang berkaitan dengan pembentukan bahaya di kawasan awam, yang boleh menjadi kacau ganggu awam. Kewajipan berjaga-jaga tidak boleh diwakilkan tersebut hanya boleh diguna pakai dalam hal keadaan terhad dan tertentu kerana doktrin tersebut mengenakan kewajipan ketat dan dalam banyak keadaan, itu akan menjadi tidak realistik dan hampir mustahil untuk orang yang menanggung kewajipan itu memenuhi kewajipan yang dipersoalkan. Keadaan semasa adalah untuk menghapuskan pengkategorian apa yang dikatakan amat berbahaya, yang dianggap pengkategorian sembarangan tetapi untuk membuat penilaian aktiviti dan sama ada terdapat langkah pencegahan yang ada untuk mengalihkan atau mengurangkan bahaya.

(3) Kerja-kerja penggalian yang dibuat TNB tidak menarik pengenaan kewajipan berjaga-jaga tidak boleh diwakilkan. Langkah berjaga-jaga yang sepatutnya diambil oleh kontraktor-kontraktor pihak ketiga adalah pelaksanaan pemetaan utiliti sebelum apa-apa penggalian dibuat yang akan menunjukkan adanya kabel bawah tanah TNB. Walau bagaimanapun, tiada pelaksanaan pemetaan utiliti dibuat oleh kontraktor-kontraktor pihak ketiga. Jika pelaksanaan pemetaan utiliti dibuat, lokasi sebenar kabel-kabel TNB akan diketahui dan dengan itu, akan menghalang kontraktor-kontraktor pihak ketiga daripada menggerudi dan merosakkan kabel-kabel TNB. Risiko kerosakan pada kabel-kabel TNB boleh dielakkan.

(4) Seksyen 37(12) Akta Bekalan Elektrik 1990 tidak boleh ditafsir sebagai mengenakan kewajipan berjaga-jaga tidak boleh diwakilkan pada pihak pemilik rumah. Juga, itu tidak menyatakan bahawa pemilik rumah berkewajipan memohon kebenaran TNB. Kesemua lesen adalah sama ada dikeluarkan atau diperlukan untuk dikeluarkan kepada perunding-

perunding dan kontraktor-kontraktor (pihak ketiga). Lesen tidak diperlukan untuk dikeluarkan kepada defendan-defendan, sebagai pemilik rumah. Peruntukan tersebut menghalang orang yang menjalankan kerja-kerja di kawasan berhampiran pemasangan elektrik tanpa kebenaran TNB. Kegagalan memperoleh kelulusan itu akan menarik hukuman seperti yang diperuntukkan bawah s. 37(12)(b) Akta itu.

(5) Aktiviti kerja-kerja penggalian dalam kes ini tidak boleh secara munasabah dikatakan membahayakan secara luar biasa. Tiada keterangan bahawa terdapat risiko tertentu daripada kerja-kerja pengubahsuaian yang masih banyak walaupun kerja-kerja pengubahsuaian itu dibuat sewajarnya. Kerja-kerja penggalian yang dibuat oleh kontraktor-kontraktor bebas adalah kerja-kerja pembinaan rutin di kawasan perumahan oleh pemilik rumah melalui kontraktor-kontraktor bebas dan tidak boleh dinyatakan sebagai aktiviti yang membahayakan secara luar biasa, di mana pemilik rumah mempunyai kewajipan berjaga-jaga tidak boleh diwakilkan terhadap syarikat utiliti awam, iaitu TNB, atas kecuaian kontraktor-kontraktor bebas tersebut.

(6) Setelah memenuhi keperluan ambang, iaitu kategori-kategori *Woodland* dan lima ciri-ciri penentuan hubungan istimewa bawah kategori kedua, mahkamah selanjutnya perlu mempertimbangkan sama ada adil dan munasabah untuk mengenakan kewajipan berjaga-jaga tidak boleh diwakilkan dalam keadaan tertentu, mengambil kira pertimbangan polisi. Sebagai perkara polisi, dari sudut pandangan pembahagian risiko, tidak adil dan munasabah untuk memutuskan bahawa kerja-kerja pembinaan rutin di kawasan perumahan tertakluk pada kewajipan berjaga-jaga tidak boleh diwakilkan kerana ini akan mendedahkan pemilik rumah dengan liabiliti terbuka untuk tindakan-tindakan tort kontraktor bebas, di mana cara mereka bekerja bukan dalam kawalan. Soalan (i) adalah dengan itu, dijawab secara negatif.

(7) Secara pentingnya, prinsip kewajipan berjaga-jaga tidak boleh diwakilkan adalah pengenaan kewajipan positif untuk melindungi seseorang daripada bahaya, yang adalah jurisprudens asas undang-undang kecuaian. Frasa 'kewajipan positif untuk melindungi seseorang daripada bahaya' tidak boleh dikelirukan dengan ciri-ciri penentuan hubungan istimewa yang wujud apabila membuktikan kategori kedua kes-kes yang menyatakan 'The defendant delegated to a third party a function which is an integral part of the positive duty …'. Poin atau isu bawah kategori kedua dalam hal ini bukan mengenai 'kewajipan positif' semata-mata, tetapi 'defendan mewakilkan pada pihak ketiga fungsi yang adalah bahagian penting kewajipan positif defendan'. Oleh itu, tiada isu bahawa Mahkamah Rayuan menggabungkan kategori pertama dan

kedua. Dengan itu, mahkamah menolak untuk menjawab soalan (ii).

(8) Inti pati kewajipan berjaga-jaga tidak boleh diwakilkan adalah kewajipan untuk memastikan penjagaan diambil. TNB telah memplid inti pati kewajipan berjaga-jaga tidak boleh diwakilkan dengan secukupnya. Oleh itu, mahkamah menolak untuk menjawab soalan (iii).

Case(s) referred to:

Biffa Waste Services Ltd v. Maschinenfabrik Ernsk Hese GMBH [2009] 3 WLR 3242 ***(foll)***
Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor [1993] 3 CLJ 205 SC ***(refd)***
Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal [2018] 3 CLJ 427 FC ***(refd)***
Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal [2017] 10 CLJ 529 FC ***(refd)***
Honeywill & Stein v. Larkin Bros [1934] 1 KB 191 ***(refd)***
Kondis v. State Transport Authority [1984] 154 CLR 672 ***(refd)***
Leichhart Municipal v. Montgomery [2007] 230 CLR 22 ***(refd)***
Mehrzad Nabavieh & Anor v. Chong Shao Fen & Anor And Another Appeal [2016] 5 CLJ 236 CA ***(refd)***
Ng Huat Seng v. Munib Mohamad Madni [2017] SGCA 58 ***(foll)***
Pickard v. Smith [1861] 10 CB (NS) 470 ***(refd)***
Stevens v. Brodribb Sawmilling Co Pty [1986] ALJR 184 ***(refd)***
Stoneman v. Lyons [1975] 60 ALJR 173 ***(refd)***
Tenaga Nasional Bhd v. Syarikat Bekalan Air Selangor Sdn Bhd & Anor [2017] 6 CLJ 356 CA ***(refd)***
Woodland v. Essex County Council [2013] UKSC 66 ***(refd)***

Legislation referred to:

Electricity Supply Act 1990, ss. 37(12)(a), (b), 41

For the appellant - Manuel David Morais, Pavitra Pillai, Norliza Rasool Khan & Deyvinah Ganesalingam; M/s Liza Khan Chambers
For the respondent - Balvinder Singh Kenth & Delveena Kaur Sidhu; M/s Kenth Partnership

[Editor's note: For the Court of Appeal judgment, please see Hemraj & Co Sdn Bhd & Anor v. Tenaga Nasional Bhd & Ors [2022] 7 CLJ 169 (overruled).]

Reported by S Barathi

JUDGMENT

Zabariah Mohd Yusof FCJ:

[1] The appeal before us turns on the decision of the courts below which found liability against the appellant for negligence premised upon the breach of non-delegable duty of care of the respondent.

[2] Leave to appeal was granted by this court to the appellant upon the

following questions of law:

> Question 1: Whether as a matter of policy, routine residential construction work carried out by a homeowner through its independent contractors is so extraordinarily hazardous as to impose a non-delegable duty of care on the homeowner to a public utilities company, namely TNB for the negligence of those independent contractors?
>
> Question 2: If the answer to the first question is in the negative, whether there is a special relationship between the homeowner and TNB which satisfies the criteria of the "second category" described in *Woodland v. Essex County Council* [2014] 1 All ER 482 such as to impose a non-delegable duty of care on the homeowner in respect of the negligence of its independent contractors?
>
> Question 3: Whether non-delegable duty of care is a cause of action that must be expressly pleaded particularising the basis on which the duty is said to arise or whether it is a matter of law which may be raised during submissions?

[3] The appellant is the first defendant (D1) and the respondent is the plaintiff in the High Court below. In this judgment, parties will be referred to, as they were in the High Court.

[4] The second defendant (D2) and the third parties are not parties in the appeal before us.

Background

[5] The facts are uncomplicated, but the application of the law in the imposition of a non-delegable duty of care in the present appeal is of much concern. The plaintiff, Tenaga Nasional Berhad claims for costs and expenses incurred for emergency repairs and replacement of its underground cable, which was damaged due to excavation works carried out by third-party contractors hired by the defendants, in front of a house belonging to the defendants. The excavation works was to connect the septic tank of the house to the main public sewerage system.

[6] D2 is the director of D1 together with his mother and sister.

[7] The plaintiff claims that since the defendants appointed the third parties as consultants and contractors, for the excavation, the defendants owe the plaintiff, a non-delegable duty of care. Consequently, the plaintiff claims that the defendants are liable for the negligence of their appointed consultants/contractors.

[8] The defendants took third party proceedings for indemnity against the consultants and contractors which were hired by the defendants to do the excavation works.

Issue

[9] The main thrust of the appeal is whether D1 owe a non-delegable duty

of care to the plaintiff – a personal duty to ensure that reasonable care was taken by the third party contractors in doing the said excavation works.

Findings Of The High Court

[10] The High Court found that D1 owes a non-delegable duty of care to the plaintiff and therefore liable for the loss and expense incurred by the plaintiff, despite making a finding that TP1 is the immediate tortfeasor and TP1 was blatantly negligent. The High Court held that this is an exception to the general rule that an employer is not liable for the negligent of an independent contractor. The High Court ordered TP1, TP2 and TP3 to be jointly and severally liable to indemnify D1 for the total amount of damages and the net costs that was awarded against D1 in the suit, and further ordered that such liability for indemnity is to accrue with effect from the date when D1 pays to the plaintiff, the judgment sum inclusive of the net costs.

[11] The claim against D2 was dismissed with costs.

Findings Of The Court Of Appeal

[12] The Court of Appeal affirmed the findings of the High Court in that the duty imposed on D1 is a positive duty to protect TNB underground cables and subsequently to the public, who are users of electricity distributed/transmitted *via* the underground cable. As such, the Court of Appeal held that the case falls within Category 1 of the doctrine of non-delegable duty of care, in relation to highway and hazard cases.

The Law On The Principle Of Non-Delegable Duty Of Care

[13] Liability in the tort of negligence is contingent on personal fault and a defendant would generally not be personally liable for the act of another. Non-delegable duty of care is a derogation from this fault-based principle.

[14] Non-delegable duty of care is a common law tort, the principle of which, a defendant who delegates the performance of its integral duty to an independent contractor, will invariably be held liable for the negligence of the independent contractor. It imposes a personal duty on the defendant to procure the careful performance of its integral work delegated to others. It is a term used to denote a duty which cannot be discharged by entrusting its performance to an independent contractor.

[15] The first reported case on non-delegable duty is the 19th century English case of *Pickard v. Smith* [1861] 10 CB (NS) 470 where William J placed great emphasis upon "the danger or risk that had been created" by the servants of the employer, whereby the duty of performance of the duty is incumbent upon the employer. In such a case the employer is answerable.

A Subsequent cases adopted this proposition of the "creation of danger or risk" in imposing the non-delegable duty of care.

[16] However, these decisions, have been criticised on the ground that, while they explained the nature and the consequences of a non-delegable duty, they failed to give any indication of the circumstances in which such
B a duty will arise, or the rationale for its imposition. This resulted on decisions founded on arbitrary distinctions between ordinary and extraordinary hazards.

[17] The principle was then applied more broadly by Slesser J in the Court
C of Appeal case of *Honeywill & Stein v. Larkin Bros* [1934] 1 KB 191 (*Honeywill*) to "extra hazardous" operations between ordinary and extraordinary hazards.

[18] The English Court of Appeal's decision of *Honeywill* had imposed a non-delegable duty on the principal where the act done was "ultra-
D hazardous" in its intrinsic nature. However, the ambit of an act which was ultra-hazardous as enunciated in *Honeywill* had been criticized because:

(i) of its broad and uncertain nature of the principle;

(ii) it created an untenable distinction between acts that were "inherently dangerous" and acts that were not, with special rules of absolute liability
E applying to the former; and

(iii) it provides an irrational approach as it includes factors that increase the hazard but exclude from consideration precautionary measures that reduce the hazard.

F **[19]** The High Court of Australia in *Stoneman v. Lyons* [1975] 60 ALJR 173 and *Stevens v. Brodribb Sawmilling Co Pty* [1986] ALJR 184 rejected outright the idea of a separate category of extra hazardous acts, due to the difficulty of ascertaining what acts are extra hazardous and what is not. Mason J in *Stevens v. Brodribb* preferred to adopt the traditional common law response to
G the creation of danger was "not to impose strict liability but to insist on a higher standard of care in the performance of an existing duty" ([1986] 60 AJLR at p. 199).

[20] Subsequently, Stanley Burton LJ in the English Court of Appeal in *Biffa Waste Services Ltd v. Maschinenfabrik Ernsk Hese GMBH* [2009] 3 WLR
H 3242 ruled that the principle in *Honeywill* was regarded as being so unsatisfactory, that its application was to be kept as narrow as possible. He watered down the *Honeywill* effect and had reformulated the doctrine to acts which are "exceptionally dangerous whatever precautions are taken". The Court of Appeal held that there cannot be strict categorisation of what

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activity is dangerous and what is not. What it simply means is that it is impossible to define "extra hazardous" with sufficient precision.

[21] We are of the view that the approach by *Biffa Waste* is the preferred approach as it alleviate the difficulties of distinguishing activities that are inherently dangerous and one which are not. It also provides a practical and definitive guide in the determination of what would constitute an ultra hazardous act. Our Court of Appeal in *Mehrzad Nabavieh & Anor v. Chong Shao Fen & Anor And Another Appeal* [2016] 5 CLJ 236; [2016] 3 MLJ 500 also preferred the *Biffa Waste* approach.

[22] In 2013, Lord Sumption delivered the UK Supreme Court decision in *Woodland v. Essex County Council* [2013] UKSC 66, where he formulated a framework in which two broad categories of cases where the non-delegable duty of care is imposed, namely:

(i) where the defendant employs an independent contractor to perform some work which is either inherently hazardous or extraordinarily hazardous or liable to become so in the course of his work. In such situation the duty of care cannot be delegated to the independent contractor and the principal will remain liable throughout; or

(ii) where there exist special relationships between the principal and the victim such that the principal is not permitted to delegate his tortious liability to an independent contractor.

[23] The second category entails an assessment of the relationship between the parties to establish, and that relationship created a duty of care between the plaintiff and the defendant which could not be delegated to independent third parties. Lord Sumption in *Woodland* identified five defining features of that relationship to establish whether the non-delegable duty exists, which we have elaborated in our main judgment.

[24] This court in *Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal* [2017] 10 CLJ 529; [2018] 1 MLJ 685 has accepted the guiding principles as refined in *Woodland* as a useful starting point in establishing the imposition of a non-delegable duty of care. This court in the same case also emphasised that as the imposition of this duty is an onerous obligation, it reiterates that the proviso in *Woodland* has to be kept in mind, that such duties should only be imposed where it is fair, just and reasonable to do so, based on the facts and circumstances of the case, developed incrementally from existing categories and consistent with underlying principles.

[25] However, cases like *Dr Kok Choong Seng & Anor* and *Dr Hari Krishnan & Anor v. Megat Noor Ishak Megat Ibrahim & Anor And Another Appeal* [2018] 3 CLJ 427; [2018] 3 MLJ 281 as cited by parties in their respective submissions, are limited in the application of the non-delegable duty of care

which arises from the second category of cases which involved special antecedent relationships. These two cases do not deal with the first category of cases *ie*, cases in which a non-delegable duty of care arises from extraordinary hazardous activity which results in the creation of special danger.

[26] The Court of Appeal found that the present appeal falls under the first category of cases, namely that the defendant employs an independent contractor to perform some work which is either inherently hazardous or extraordinarily hazardous or liable to become so in the course of his work. Hence, we will address the duty within the first category as enunciated by Lord Sumption.

[27] In the Malaysian jurisprudence, the concept of non-delegable duty of care which arises from an extraordinarily hazardous activity, first arose in the Supreme Court case of *Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor* [1993] 3 CLJ 205; [1993] 2 MLJ 234. However, the Supreme Court did not formulate the test, definition or standard to be imposed in the determination of what amounts to an extraordinarily hazardous activity.

[28] In imposing a non-delegable duty of care on D1 in the present appeal, the Court of Appeal held that the learned trial judge had correctly applied the case of *Tenaga National Bhd v. Syarikat Bekalan Air Selangor Sdn Bhd & Anor* [2017] 6 CLJ 356 (*SYABAS*), that the laying of water pipes by Syabas fell within the first category of exceptionally hazardous activity. However, in its analysis of this liability, the Court of Appeal in *SYABAS*, embarked on a public policy consideration that public utility bodies providing essential services to the community could not extinguish their duty of care by subcontracting the work to an independent contractor. The determining factor in the decision of *SYABAS* which imposed a non-delegable duty on the part of Syabas were that "both the appellant (TNB) and the first respondent (Syabas) are public utilities vehicles providing essential services and the excavation works were executed on a public road making such works hazardous to the public." (para. 28 of *SYABAS*).

[29] The Court of Appeal in *SYABAS*, in its determination of whether the activities therein were hazardous, failed to further consider the principle as enunciated by Stanley Burton LJ in *Biffa Waste*, namely whether the activity are exceptionally dangerous whatever precautions taken. If it is, only then the activity will be considered hazardous within the first category. The Court of Appeal in *SYABAS* failed to provide an analysis or consideration of the activity in question.

[30] Given the aforesaid, the case of *SYABAS* does not reflect the correct approach in the application of the principle of non-delegable duty of care as enunciated in *Woodlands* and *Biffa Waste*. In any event as was said by the

Court of Appeal in *SYABAS* in its concluding para. 128, that the determining factor was based on policy consideration, namely that public utilities bodies providing essential services to the community cannot extinguish their duty by sub-contracting it to an independent contractor. The statutory bodies (TNB and Syabas) could not delegate liability for negligence by their independent contractors where they are authorised to carry out the works. The reliance of the Court of Appeal in the present appeal on *SYABAS* in imposing the non-delegable duty of care is therefore misconceived.

[31] Based on *Woodland*, the correct approach to impose the non-delegable duty of care is, to firstly determine, whether the case falls under either category 1 or 2. In the case of the first category, following *Biffa Waste*, it is those acts which are "exceptionally dangerous whatever precautions are taken". In establishing the second category, it must possess all five defining features (which we have stated in the main judgment) as outlined by Lord Sumption in *Woodland*. Once the category of case has been established, the court would have to further consider whether the imposition of such a duty were fair, just and reasonable as a matter of judicial policy in the local context (refer to *Dr. Kok Choong Seng* at para. 40).

[32] With the aforesaid approach in mind, we will proceed to answer the questions posed applying the said principle based on the formulation as in *Woodland* and *Biffa Waste*.

Decision

Question 1

[33] It is the plaintiff's case that their case falls under category 1, however, the plaintiff formulated a further subdivision of category 1 into:

(i) exceptionally hazardous activities; and

(ii) highway and hazard cases.

[34] The plaintiff submitted at para. 42 of its written submission in encl. 31 that there is a standalone category of cases known as the "highway and hazard cases" which was accepted by the Court of Appeal in the present case. The works do not even have to be "extraordinarily hazardous" for non-delegable duty to apply. It is also submitted by the plaintiff that based on the principles distilled from the applicable law, as applied to the concurrent findings of facts in the present case, non-delegable duty of care was imposed on D1 on the basis that the excavation works which caused damage to the cables were carried out on public road/highway which created a hazard to the public, to utility companies, and to users of such utilities. The Court of Appeal had affirmed the findings made by the High Court and the application of the principle of non-delegable duty of care by the High Court at paras. 41 and 42 of the judgment.

[35] It is the plaintiff's stand that once the court establishes that the activity

A is carried out on a public road or highway that would attract the non-delegable duty of care.

[36] These findings by the Court of Appeal are clearly in error. Based on Lord Sumption's categorisation in *Woodland*, the first category refers to extraordinarily hazardous activities, regardless of where the activity is
B carried out. Lord Sumption in *Woodland* was not creating a new class within the first category, but merely explaining and giving examples of the development of the tort in the earlier cases which concerned the creation of hazards in a public place, which would constitute a public nuisance. For this we referred to para. 6 of the judgment in *Woodland*.

C **[37]** The creation of new categories must be done with caution and must be done by clear analogy to recognised category. Lady Hale in *Woodland* emphasised that the boundaries of the responsibility undertaken may not always be clear cut but will have to be ascertained on a case by case basis. Her Ladyship stressed the need for caution in developing the law beyond
D chartered waters (para. 27 of *Dr. Kok Choong Seng*). The non-delegable duty should only be applied in limited and exceptional circumstances because the doctrine imposes stringent duty and that in many instances, it would be unrealistic or almost impossible for the duty bearer to fulfil the duty in question.

E **[38]** In any event, premised on *Biffa Waste* which is the preferred approach (in determining whether the activity in question is extraordinarily hazardous), the present thinking is to do away with the categorisation of what is extraordinarily hazardous, which is considered as arbitrary categorisation but to make an assessment of the activity and whether there are precautions
F available to remove or mitigate the hazard.

[39] If there are available precautions, then the activity will not be described as exceptionally hazardous and does not come within category 1. However, even if, with the known precautions available, the hazard is still a viable risk, then the activity will be considered exceptionally hazardous
G within category 1.

[40] Going back to Question 1, whether the construction work carried out by a homeowner through its independent contractors is so extraordinarily hazardous as to impose a non-delegable duty of care on the homeowner; we
H are of the view that the excavation works undertaken by the plaintiff does not attract the imposition of the non-delegable duty of care, for the following reasons.

[41] Applying the *Biffa Waste*'s test to the facts of our present case, the activity carried out by the plaintiff is the connection of the sewage pipe from
I the house to the mains. The precautionary measure that ought to have been taken by the third party contractors is the utility mapping exercise before

doing any excavation as that would indicate the presence of TNB's underground cable. It is accepted that no utility mapping exercise was done by the third-party contractors in the present case. However, the test is not whether any precautionary measures were taken before the activity was carried out but rather, whether the activity (the excavation and sewage connection works) would remain extraordinarily hazardous, had the utility mapping exercise been carried out.

[42] From the evidence of PW4, if the utility mapping exercise had been carried out by the third party contractors, the precise location of the TNB's cables would be known, hence, this would have prevented the third party contractors from drilling into and damaging the TNB cables. The risk of damage to the TNB cable could have been avoided by conducting the utility mapping exercise.

[43] It therefore follows that, applying the approach taken in *Biffa Waste*, if proper precautions had been taken (*ie*, the mapping utility exercise before excavation was done) the activity of excavation works for the sewage connection is not extraordinarily hazardous. The Court of Appeal did not apply the *Biffa Waste* approach in determining whether the activity falls within the first category. The Court of Appeal at para. 56 of its judgment instead focused on the fact that the present appeal involved an unlawful and illegal excavation on public road, and further went on to say that the fact that there was failure to conduct the mapping exercise, distinguished the present appeal from the facts in *Biffa Waste*. With the greatest of respect to the Court of Appeal, it failed to appreciate the underlying principle behind *Biffa Waste*.

[44] The Court of Appeal of Singapore in *Ng Huat Seng v. Munib Mohamad Madni* [2017] SGCA 58 (*Ng Huat Seng*) has further expounded the approach by *Biffa Waste* when it held that, activity is to be considered "exceptionally dangerous whatever precautions taken, having regard to:

(i) the persistence of material risk of exceptionally serious harm to others arising from the activity in question;

(ii) the potential extent of harm if the risk materialises; and

(iii) the limited ability to exclude this risk despite exercising reasonable care."

[45] Even applying the considerations as expounded in *Ng Huat Seng* to the facts of the present case, from the evidence of PW4, the persistence of risk of damage to TNB cables in the course of sewage connection works is "very rare". It was in evidence that it was very rare for TNB to experience damage to its 132kV cable as a result of third party activities.

[46] Given that it was the duty of the third party contractors to do the utility mapping exercise, they would have been aware of the underlying cables. This coupled with the low persistence of risk of damage to the TNB

A cable affirms the fact that the sewage connection works carried out by the houseowner is not an extraordinarily hazardous activity.

[47] The Australian High Court in *Stevens v. Brodribb* rejected the principle that non-delegable duty of care could be imposed on a principal who engages an independent contractor to carry out extraordinarily hazardous activity and
B took the position that "the extent of a duty of care will depend upon the magnitude of the risk involved and its degree of probability." Given the evidence from PW4, the magnitude of the risk is minimal and the degree of probability of the risk is rare.

C **[48]** The Court of Appeal in the present appeal held at para. 42 that the duty imposed on Hemraj (D1) is a positive duty to protect TNB cables and subsequently to the public who are users of electricity distributed/ transmitted *via* the underground cable. As such, the Court of Appeal found that that this appeal falls within category 1 of the doctrine on delegable duty of care, in relation to highway and hazard cases. Of relevance in this respect,
D is the decision of the High Court in Australia in *Leichhart Municipal v. Montgomery* [2007] 230 CLR 22 which dealt firstly, with the issue whether the road authority owes a non-delegable duty to the public/road users using the road and secondly, the fundamental nature of a non-delegable duty of care. The High Court answered the first issue in the negative, and as for the
E second issue, a majority of the court rules that the non-delegable duty of care is not a freestanding tort, but rather a doctrine of strict liability arising in cases of negligence. Kirby J pointed out that unlike the recognised recipients of non-delegable duties, public/road users do not constitute a closed class of persons whose identity is ascertainable in advance and there is not the degree
F of vulnerability that exists with respect to the hospital patient, employee and school pupil. A further problem was that the doctrine is "subject to an indeterminate qualification in the case of casual or collateral acts of negligence". Kirby J also considered that there were significant policy justifications for the rejection of a non-delegable duty in the said case when
G he said:

> The general rule is that the principal is not liable for the wrongs done by an independent contractor or its employees. It is not easy to see why an exception should be specifically carved out allowing the person injured to recover from a road authority in addition to the normal rights that the person enjoys against the independent contractor posited as the effective
H cause of the wrong.

[49] The Australian position has been that, where the activity is extra-hazardous, higher standard of care is imposed. It may be delegated to an independent contractor, however liability will only be imposed on the principal if a special relationship is established (Mason J in *Kondis v. State*
I *Transport Authority* [1984] 154 CLR 672).

[50] Distilling from the approaches as taken by the English courts in *Biffa Waste*, the Singaporean Court in *Ng Huat Seng* and the Australian court in *Stevens v. Brodribb*, the Court of Appeal in the present appeal had erred when it failed to take into account any of the relevant factors leading to the imposition of the duty for the excavation works carried out by the third-party contractors of the defendants.

[51] The plaintiff submits that the formal requirements set by the regulatory bodies expressly made the homeowners liable for the damage caused to third parties' utilities as a result of the works. The formal permit requirements set by the regulatory bodies, including IWK and DBKL, also mandated that D1 to obtain the approval of the utility companies prior to the commencement of the works. D1 did not give notice to TNB, much less obtain prior approval to commencing the works. This duty, according to the plaintiff is also non delegable. The plaintiff further submits that s. 37(12)(a) of the Electricity Supply Act 1990 (ESA) imposes a mandatory duty for TNB's approval to be obtained prior to any activity in the vicinity of any TNB's electrical installations. Since the law imposes a strict duty of care on the employer, that duty cannot be discharged to an independent contractor.

[52] We disagree with the submissions of the plaintiff. The facts, in the present appeal show that all licenses were either issued or were required to be issued to the consultants and contractors (third parties). They were not required to be issued to the defendants, as homeowners. The DBKL license was issued to the Consultant Engineers and LCS Engineering, whilst the IWK approval was issued to the Consultant Engineers (encl. 10 p. 1237 and p. 1354 respectively). In fact, it was also the findings of the High Court at para. 128 that it was the engineers who were obliged to obtain the approvals and permits as they have overall supervision of the works.

[53] Further, s. 37(12)(a) of the ESA cannot be construed to impose a non-delegable duty of care on the part of the homeowner. Neither does it state that it was the duty of homeowners to obtain approval from TNB. The provision prohibits persons who carry out works in the vicinity of electrical installations without TNB's authority. Failure to obtain such approval attracts a penalty as provided in s. 37(12)(b) of the same.

[54] The High Court made findings that the non-delegable duty of care on the part of D1 can be inferred from the insurance policy taken by D1 to insure against the risk of damage to surrounding property. D1 was under a contractual obligation to comply with the precondition for the insurance policy.

[55] A perusal of the insurance policy in encl. 10 p. 1371 discloses that it was taken out as a condition imposed on the DBKL license issued on the Consultant Engineer. It was there that the homeowner was described as the

A "contractor". But nothing turns on this, as this was done to satisfy the requirements of the Consultant's DBKL license for the consultant to have an all risk contractors insurance policy.

[56] We are of the view that the Court of Appeal fell into error when it imposed a blanket duty on the basis that the present appeal falls into the B "highway and hazard" category without alluding to established principles in case law authorities. These findings certainly fall short of the necessary considerations before imposing the duty under the first category.

[57] Given the aforesaid, applying the principles as enunciated in *Woodland* and *Biffa Waste*, it is evident that the activity of excavation works in this case C cannot be reasonably be said to be extraordinarily hazardous. Excavations works are routinely done and there is nothing to suggest nor explanation, that despite the exercise of reasonable care, *vis-a-vis* the mapping exercise done, there remains a material risk of exceptionally serious harm arising from such excavation works. The fact that the works were carried out near a highway D is not the issue. The central issue is whether such excavations works are exceptionally dangerous whatever precautions are taken (*Biffa Waste* at para. 78).

[58] In the present appeal, there is no evidence that there is a particular risk from the renovation works that remained substantial even if the renovation E works were done properly. We found that the excavation works carried out by the independent contractors were routine residential construction works carried out by a homeowner through its independent contractors cannot be described as extraordinarily hazardous activity, whereby the homeowner owes a non-delegable duty of care, to a public utilities company, namely the F plaintiff, TNB for the negligence of those independent contractors.

[59] The *Woodland* categories and the five defining features of the special relationships under the second category are threshold requirements. The determination as to whether the principle of non-delegable duty of care applies, does not however end there. After fulfilling the threshold G requirements, the court has to further consider whether it is fair and reasonable to impose non delegable duty of care in the particular circumstances, having regard to policy considerations (see *Dr. Kok Choong Seng*).

H **[60]** In the present appeal, as a matter of policy, from a risk allocation point of view, it would not be fair, just and reasonable to hold that routine residential construction works are subject to non-delegable duty as this would

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expose homeowners to an indeterminate liability for the tortious acts of their independent contractors, whose manner of work are beyond their control.

[61] Given the aforesaid, we answer Question 1 in the negative.

Question 2

Was There A Special Relationship Between The Homeowner And TNB Which Satisfies The Criteria Of The Second Category As Described In Woodland Such As To Impose A Non-delegable Duty Of Care On The Homeowner In Respect Of The Negligence Of Its Independent Contractors?

[62] D1 submits that the Court of Appeal has conflated the two categories, which is a clear misdirection of law on the part of the Court of Appeal, when it held that our present appeal "falls within category 1 of the doctrine on delegable duty of care, in relation to highway and hazard cases", and that "... the duty imposed on defendant is a positive duty to protect TNB cables and subsequently to the public." D1 submits that the words "... the duty imposed on defendant is a positive duty to protect TNB cables and subsequently to the public ..." are characteristics of the second category.

[63] However, we disagree with the submissions by D1 in this respect because we fail to see how such holding by the Court of Appeal amounts to conflating the two categories as enunciated by Lord Sumption. We say this because essentially the principle of non-delegable duty of care is the imposition of a positive duty to protect one from harm, which is the fundamental jurisprudence of the law of negligence.

[64] The phrase "the positive duty to protect another from harm" is not to be confused with the defining features of the special relationship which exists in establishing the second category of cases which states:

> The defendant delegated to a third party a function which is an integral part of the positive duty.

The point or issue under the second category in this respect is not about "positive duty" *per se*, but the "defendant delegating to a third party a function which is an integral part of the positive duty of the defendant."

[65] Hence, there is no issue of the Court of Appeal conflating the first and the second categories.

[66] Given the aforesaid, the proposed Question 2 does not reflect the decision of the Court of Appeal as the issue of a special relationship between the homeowner and TNB does not arise.

[67] We therefore decline to answer Question 2.

Question 3

Whether Non-Delegable Duty Of Care Is A Cause Of Action That Must Be Expressly Pleaded Particularising The Basis On Which The Duty Is Said To Arise

A *Or Whether It Is A Matter Of Law Which May Be Raised During Submissions?*

[68] The essence of a non-delegable duty is a duty to ensure that care is taken.

[69] In the present appeal, we found that the plaintiff at paras. 18(iii) and
B (iv) of its statement of claim (SOC) has sufficiently pleaded the essence of a non-delegable duty of care.

[70] The proposed question is fact driven depending on how it is pleaded. Hence, we decline to answer Question 3.

C **Conclusion**

[71] The findings of both courts below, are that the third party contractors are the tortfeasors for the damage. It is interesting to note that, the orders by the learned trial judge that although D1 was found to owe a non-delegable duty of care to the plaintiff and liable for the loss and expenses incurred by
D the plaintiff, the High Court also ordered TP1, TP2 and TP3 to be jointly and severally liable to indemnify D1 for the total amount of damages and the net costs that was awarded against D1 in the suit. At the end of it all, the third party contractors were made to pay for the loss and expenses incurred by the plaintiff. The plaintiff could have taken the direct route to claim for compensation for the damage caused to the underground cable from the third
E party contractors premised on the normal tortious principles. If it is D1 which is responsible under the non-delegable duty of care, D1 should be paying for the loss and expense to the plaintiff, not the third parties. In any event, it is difficult to see why a special exception should be carved out for the plaintiff in addition to the rights of redress it enjoys under the statutes
F namely:

(i) Section 37(12) of the Electricity Supply Act 1990 prohibits any activity in the vicinity of electrical installation or part thereof in a manner likely to interfere with any electrical installation or to cause danger to any person or property. It provides for criminal penalty.

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(ii) Section 41 of the Electricity Supply Act 1990 imposes strict liability on any person who damages TNB's property. Any person who commits such an offence may be liable to pay full compensation for the damage he has done.

H **[72]** It would appear that this is one of the cases where the duty of care can be satisfactorily analysed by reference to ordinary standards of care rather than the circuitous imposition of a non-delegable duty of care on D1.

[73] We therefore allow the appeal with costs of RM250,000 to the
I defendant/appellant subject to allocator. We set aside the decision of the courts below.